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IN THE

Supreme Court of the United States

October Term, 1961.

No. 327 327

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

against

INTERSTATE COMMODITIES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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THE REPORTER COMPANY, INC., NEW YORK 7, N. Y.—REctor 2-6978—1961

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Facts.

Sidetrack; Its Use and Inspection by the Petitioner and the Petitioner's Actual Knowledge of the Existence of the Canopy:

The canopy was erected in July, 1955 (73A-80A). The accident happened October 23, 1957, 3 A. M. (Central 15A, 23A, 44A). Within this 27-month period, the Central switch crews used the sidetrack five or six times weekly, without incident—a total of 812 times (72A).

During the two or three days the canopy was under construction in July, 1955, Central employees used the sidetrack delivering and removing cars and working along the main line, adjacent to the sidetrack. They observed the respondent's employees constructing the canopy and engaged them in conversation (79A-81A).

In the spring of 1957, an engineer and freight agent of the Central inspected the sidetrack and property of the respondent; made measurements of the clearance between the building and sidetrack for the purpose of determining the best manner to extend the sidetrack facilities (40A, 41A, 74A, 75A; Central 58A, 65A). Plans were prepared by the Central and submitted to the respondent (75A, Central 60A, 61A). A second inspection was made by the engineers (75A, Central 60A, 61A). One of the engineers who make the inspections was in charge of the operation and maintenance of the sidetracks (64A).

A Central representative daily checked the cars on the sidetrack in order to compute the demurrage charges on cars not promptly loaded or unloaded (74A).

The switching crew, of which Ratigan was a member, worked the night shift from April to October, 1957 (Central 16A). During this period they switched cars on the sidetrack four or five times a week—130 times, without incident (48A; 72A).

The Accident:

Conductor Bazar was in charge of and supervised the crew's work (45A, 47A, 56A; Central 40A). Plaintiff Ratigan knew that Bazar was the boss (45A, 47A).

The members of the night crew, of which Ratigan was a member, between April and October, 1957, never rode on top of a freight car being switched into or taken out of the Interstate siding (77A, 80A, 84A, 85A). Mr. Strang, a Cen-

tral conductor and brakeman who worked in and about the Troy yards for 35 years, testified that members of the switching crew never rode the top of a car while it was being "kicked" into or taken out of the Interstate siding (84A, 85A).

Visibility on the night of the accident was sufficiently clear so that plaintiff could see his way about the railroad yard without artificial illumination in the course of performing his duties (49A).

Bazar did not give any signal to Ratigan of his intention to brake the car, being switched into the siding; he made no effort to ascertain Ratigan's position (22A, 23A, 26A, 27A, 29A).

Ratigan did not give any signal to Bazar of his intention to brake the car (51A, 52A; Central 42A).

The lanterns they carried were intended to pass signals between them in the course of their work—intended to let each know what the other was doing (36A).

Bazar stood on the brake platform, located three feet below the top of the car (22A, 23A, 29A, 30A).

Ratigan walked along the 40-foot catwalk, carrying a lighted lantern. When he reached the end of the freight car, he knelt on both knees and was about to put his foot on the top rung of the ladder when the accident happened (34A, 35A; Central 37A).

Bazar did not see Ratigan at any time as he walked along the catwalk. After Ratigan had completed walking the length of the car, Bazar saw him at the instant that he set his lamp down on the top of the car (Central 45, 47). At that moment Bazar saw Ratigan, and he was about to say to him, "What are you doing here," when Ratigan toppled over (Central 23A; 35A).

As Ratigan walked along the top of the car, he clearly saw the outlines of the catwalk (49A). He was able to plainly see other portions of the top of the car (49A). He did not see Bazar at any time prior to the accident (50A).

The ordinary and usual method for delivering a loaded car into a sidetrack was by delivering it while still coupled to the engine (33A, 72A).

The Central had a Safety Bureau in the division embracing the Troy yard. Its practice and custom was to make periodic inspections of its right of way and all sidetracks. Safety Bureau personnel would make written inspection reports (69A). The Central did not swear any Safety Bureau representatives and did not offer in evidence any of their reports concerning the inspections of the Interstate sidetrack (T330).

Interstate had notified the Central that all operations at its siding should be completed before 9 P. M. daily. This notice was given to Central's Traffic Manager Grimes in May, 1957, and he agreed to comply with that request (77A).

Interstate's Acquisition of the Sidetrack:

Prior to 1949, Interstate acted as a commission broker in Albany, New York, and had no direct experience with railroad sidings (Central 63A). All merchandise it sold was shipped by manufacturers direct to Interstate's customers (71A).

In March, 1950, Interstate purchased a building on the south side of Madison Street, Troy, New York, adjacent to Troy Union's right of way (37A; Central 31A). This purchase included an adjacent railroad siding. In this transfer a sidetrack agreement (Defendant's Exhibit A) between Finger Lakes and Hudson Flour Mills, Inc., and Troy Union, dated March 8, 1937, was assigned, with Troy Union's consent, and delivered to Interstate (71A).

Interstate had no dealings with Troy Union prior to, or at the time of, its purchase of the Madison Street property. No railroad companies were represented at the transfer (72A). Nothing was said about any other railroads purporting to have any interest or rights under the sidetrack agreement (72A; T367). Nothing was said about any relationship between Troy Union and the Central (72A).

Prior to the trial of this action, Interstate knew of no relationship between Troy Union and the Central (72A; T367). Nor did it have any knowledge relating to the terms under which various railroads used the Troy yards (72A; T367).

The Reasons Why the Application for the Writ Should be Denied.

1. The answers to questions "3," "4," "5," and "6," factually establish acts of commission negligently performed by the Central. Such acts are active negligence as a matter of law *(Putvin v. Buffalo Electric Co.,* 5 N. Y. 2d 447 [1959]; *Bush Terminal Buildings Co. v. Luchenback Steamship Co.,* 9 N. Y. 2d 426, Advance Sheet #277 5-17-61).

> "* * * we could not view the Railroad's conduct in pushing the car ridden by the interstate past the post * * * as negligence less active than that of the Lumber Company" (*Dery v. Wyer,* 265 F. 2d 804, 2nd Cir. 1959).

> "There is much in the evidence as to the delinquency of the Railroad, which alone selected the time and place and was in complete charge and control of the sidetrack movement, to warrant a conclusion of active negligence. The admitted fumbling of instructions and the manner in which the move was made, which resulted in two men on the top of the boxcar where one should have been, is sufficient to support the answers to Questions '5' and '6' that the method of operation was negligent and proximately caused the accident and injury" (Judge Foley's opinion, Central Appendix, 9A).

An actively negligent tort-feasor is not entitled to common-law indemnity. *Tipaldi v. Riverside Memorial Chapel,* 273 App. Div. 414 (1948), affirmed 298 N. Y. 686, 82 N. E. 2d 585; *Guarnieri v. Kewanee-Ross Corp.,* 270 F. 2d 575, 2nd Cir. 1959.

2. The jury having passed upon the facts relating to "method of operation," it was not within their province to characterize those findings as passive.

Without objection, the Court defined the phrase "method of operation." This became the law of the case (*Imbrey v. Prudential Insurance Co.,* 286 N. Y. 434 [1941]).

Question "7" did not present any factual issue for the jury to determine.

The moment the jury answered questions "5" and "6" as it did, the question whether the Central's causally related faults of commission constituted active or passive negligence became a question of law for the Court and ceased to be a question of fact for the jury. Accordingly, to the extent that finding "7" may relate to the Central's faults of commission and label them "passive," it is not a finding of fact.

This case would be in precisely the same posture had the jury not answered question "7." Having found the Central guilty of causally related faults of commission, the jury had made the dispositive factual findings which then required the Court to direct entry of judgment dismissing the first cause of action.

As a mechanical matter, when question "7" was submitted, the Court might properly have prefaced it with the instruction to answer it only if the jury answered "No" to questions "5" and "6."

United States District Judge Foley treated question number "7" and the answer thereto as mere surplusage in view of the affirmative answers to questions "5" and "6" (Central 10A). The majority opinion of the Circuit Court of Appeals agreed with this ruling (Application, p. 22).

3. The language of Subdivision "a" of Rule 49 is clear and unambiguous—there is no substantial conflict among the various Circuits in their judicial interpretation of the subdivision.

> "The formulation of issues, however, is a matter resting in the sound discretion of the Trial Judge * * *. The number and form of issues, if they present the case fairly, is a matter resting in the sound discretion of the Trial Judge. Rule 49A of the Rules of Civil Procedure, 28 U. S. C. A.; *Mourikas v. Vardianos*, 4th Cir., 169 Fed. 2d 53, 57; Moore Federal Practice, 2nd Edition, Vol. 5, page 2206" (*Norfolk Southern Railway Co. v. Davis Frozen Foods*, 4th Cir. 1952, 195 Fed. 2d 662, 2nd appeal, 4th Cir., 204 Fed. 2d 839, certiorari denied, 1953, 346 U. S. 824, 74 Supreme Court 41).

Interrogatories must present only questions of fact for a jury to determine (*Carpenter v. Baltimore & Ohio Railroad*, 109 Fed. 2d 375 [1940]).

The procedure under 49a leaves to the Trial Judge the responsibility of applying appropriate legal principles to the facts found by the jury.

The Trial Judge reserves a large measure of control over the judgment to be entered, in the interest of substantial justice between the parties (*Momand v. Universal Film Exchange*, D. C. D. Mass., 1947, 72 F. Supp. 469, 485; *Halprin v. Mora*, 3 Cir. 1956, 231 F. 2d 197).

A special verdict is where the jury finds the facts of the case, and refer the decision of the cause upon those facts to the Court (*Sugdam v. Williamson*, 61 U. S. 427; *New Orleans Ins. Assoc. v. Piaggio*, 83 U. S. 378 [1873]).

The Judge has the responsibility to apply appropriate legal principles to the facts found by the jury (*Cato v. Good Bros., Inc.*, 3rd Cir. 1950, 181 F. 2d 146; *Thedorf v. Lipsey*, 7th Cir. 1956, 237 F. 2d 190; 5 Moore's Federal Practice, 2nd Edition 2204).

4. The Trial Court correctly dismissed the second cause of action because a beneficial intent is not, as it is required to be, clearly found in the sidetrack agreement (*Beveridge v. N. Y. Elevated Railroad Co.*, 112 N. Y. 1, 1889; *Skinner Bros. Manufacturing Co., Inc., v. Shevlin E. Co., Inc.*, 231 App. Div. 656, 658-659, 248 N. Y. S. 380, 382 [1st Dept. 1931], aff'd without opinion 257 N. Y. 562 [1931]; see also *Restatement, Contracts,* Section 133, reciting that the intention to confer benefit on a third-party must appear "FROM THE TERMS OF THE AGREEMENT").

The sidetrack agreement (Defendant's Exhibit A) discloses no intent to indemnify any party but Troy Union. It says, "The Industry shall * * * indemnify and hold harmless the Railroad Company * * *." It does NOT say, "The Industry shall * * * indemnify and hold harmless the Railroad Company and its licensees."

In fact, the agreement is on a printed form which contains the name, "The New York Central Railroad Company (hereinafter called the Railroad Company), party of the first part." From this, "New York Central" was stricken and "Troy Union" inserted. Clearly, if this agreement was intended to inure to the benefit of the Central, its name could easily have been left in the agreement, and Troy Union's inserted as an additional party. This was not done. The agreement, as prepared, is limited to Troy Union as the Railroad and The Finger Lakes and Hudson Flour Mills, Inc., as the Industry. The requirement that the beneficial intent be "clearly found in the agreement" is NOT met.

In this vital respect, the agreement is unlike the usual municipal construction contract, expressly reciting, in clear terms, the contractor's obligation to compensate members of the public injured by reason of construction. *Rigney v. N. Y. C. & H. R. R. Co.*, 217 N. Y. 31, 37 (1916), and *Coley v. Cohen*, 258 App. Div. 292 (4th Dept. 1939), are typical of that line of cases.

Any intention to benefit the Central could certainly have been expressed in few words. Because no such intent appears, the Central is not a third-party beneficiary of the sidetrack agreement, and its second cause of action against Interstate was properly dismissed as a matter of law.

The application for the writ should be denied.

Dated: August 30, 1961.

Respectfully submitted,

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